Before the
Federal Communications Commission
Washington, D.C. 20554

In The Matter of The Applications of	)	
Gowdy FM 95, Inc. (Assignor) and Clear Channel Broadcasting Licenses, Inc. (Assignee)	)	File No. BALH-20000915ABK
For Consent to the Assignment of the License of KCGY(FM), Laramie, WY	)	
And	)	
Gowdy Family LP (Assignor) and Clear Channel Broadcasting Licenses, Inc. (Assignee)	)	File No. BAL-20000915ABQ
For Consent to the Assignment of the License of KOWB(AM), Laramie, WY	)	

MEMORANDUM OPINION AND ORDER

Adopted: February 14, 2002 **Released: March 19, 2002**

By the Commission: Chairman Powell and Commissioners Abernathy, Copps and Martin issuing separate statements.

1. In this order, we consider the above-captioned applications of Clear Channel Broadcasting Licenses, Inc., a wholly owned subsidiary of Clear Channel Communications, Inc. ("Clear Channel") to acquire the license of station KCGY(FM), Laramie, Wyoming from Gowdy FM 95, Inc., and the license of station KOWB(AM), Laramie, Wyoming from Gowdy Family LP (File Nos. BAL/BALH-20000915ABK, ABQ). The sellers are related entities with common principals. These applications were uncontested. Because these applications were pending when we adopted the Notice of Proposed Rulemaking in MM Docket No. 01-317 ("*Local Radio Ownership NPRM*"), we resolve the competitive

concerns raised by these applications pursuant to the interim policy adopted in that notice.[1] After reviewing the record, we find that grant of these applications is consistent with the public interest.

I. INTRODUCTION

2. For much of its history, the Commission has sought to promote diversity and competition in broadcasting by limiting the number of radio stations a single party could own or acquire in a local market.[2] In March 1996, the Commission relaxed the numerical station limits in its local radio ownership rule in accordance with Congress's directive in Section 202(b) of the Telecommunications Act of 1996. Since then, the Commission has granted thousands of assignment and transfer of control applications proposing transactions that complied with the new limits. In certain instances, however, the Commission has received applications proposing transactions that would comply with the new limits, but that nevertheless would produce concentration levels that raised significant concerns about the potential impact on the public interest.

3. In response to these concerns, the Commission concluded that it has "an independent obligation to consider whether a proposed pattern of radio ownership that complies with the local radio ownership limits would otherwise have an adverse competitive effect in a particular local radio market and[,] thus, would be inconsistent with the public interest."[3] In August 1998, the Commission also began "flagging" public notices of radio station transactions that, based on an initial analysis by the staff, proposed a level of local radio concentration that implicated the Commission's public interest concerns.[4]

4. On November 8, 2001, we adopted the *Local Radio Ownership NPRM*. We expressed concern that "our current policies on local radio ownership [did] not adequately reflect current industry conditions" and had "led to unfortunate delays" in the processing of assignment and transfer applications.[5] Accordingly, we adopted the *Local Radio Ownership NPRM* "to undertake a comprehensive examination of our rules and policies concerning local radio ownership" and to "develop a new framework that will be more responsive to current marketplace realities while continuing to address our core public interest concerns of promoting diversity and competition."[6] In the *NPRM*, we requested comment about possible interpretations of the statutory framework, including whether the new numerical station ownership limits definitively addressed the permissible levels of radio station ownership, whether they addressed diversity concerns only, or whether they established rebuttable presumptions of ownership levels that were consistent with the public interest. We also requested comment on how we should define and apply our traditional goals of promoting diversity and competition in the modern media environment. The *NPRM* also sought comment on how we should implement our policies toward local radio ownership.

5. In the *Local Radio Ownership NPRM*, we also set forth an interim policy to "guide [our]

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[1] *See Rules and Policies Concerning Multiple Ownership of Radio Broadcast Stations in Local Markets*, 16 FCC Rcd 19861, 19894-97 ¶¶ 84-89 (2001).

[2] *See generally id*. at 19862 - 70 ¶¶ 3-18.

[3] *CHET-5 Broadcasting, L.P.*, Memorandum Opinion and Order, 14 FCC Rcd 13041, 13043 ¶ 8 (1999) (citing 47 U.S.C. § 309(a) and *KIXK, Inc.*, 13 FCC Rcd 15685 (1998)). *See also Shareholders of Citicasters, Inc.*, Memorandum Opinion and Order, 11 FCC Rcd 19135, 19141-43 ¶¶ 12-16 (1996).

[4] *See* Public Notice, Broadcast Applications, Rep. No. 24303 (rel. Aug. 12, 1998). Under this policy, the Commission flagged proposed transactions that would result in one entity controlling 50 percent or more of the advertising revenues in the relevant Arbitron radio market or two entities controlling 70 percent or more of the advertising revenues in that market. *See AMFM, Inc.*, 15 FCC Rcd 16062, 16066 ¶ 7 n.10 (2000).

[5] *Local Radio Ownership NPRM,* 16 FCC Rcd at 19870 ¶ 19.

[6] *Id.*

actions on radio assignment and transfer of control applications pending a decision in this proceeding."[7] Although we recognized the need to "handle currently pending radio assignment and transfer applications and to address any future applications filed" while the *NPRM* is pending, we disavowed any intent to prejudge the "ultimate decision" in the rulemaking and rejected any "fundamental" changes to our current policy pending completion of the rulemaking.[8]

6. Under our interim policy, "we presume that an application that falls below the [50/70] screen will not raise competition concerns" unless a petition to deny raising competitive issues is filed. For applications identified by the 50/70 screen, the interim policy directs the Commission's staff to "conduct a public interest analysis," including "an independent preliminary competitive analysis," and sets forth generic areas of inquiry for this purpose.[9] The interim policy also sets forth timetables for staff recommendations to the Commission for the disposition of cases that may raise competitive concerns.

7. We decide the applications before us pursuant to our interim policy. Under our interim policy, we first conduct a competition analysis of the proposed transaction. Here, we conclude that the appropriate geographic market for our analysis is not the relevant Arbitron "metro,"[10] which in this case is the Cheyenne metro, to which the Gowdy Stations are assigned by Arbitron. Because of topological factors peculiar to this case, we are persuaded that the Cheyenne metro and the Laramie vicinity are separate geographic markets. Our competition analysis in this proceeding is therefore truncated because Clear Channel currently owns no stations in the Laramie geographic area, and we find that that the proposed merger is likely to have little or no effect on radio competition in the Cheyenne metro.

II. BACKGROUND

8. Clear Channel currently owns five stations in the Cheyenne metro: KGAB(AM), Orchard Valley, Wyoming; KIGN(FM), KLEN(FM), and KOLZ(FM), Cheyenne, Wyoming; and KMUS(FM), Burns, Wyoming (collectively, the "Clear Channel Stations"). It proposes to acquire two additional stations, KCGY(FM) and KOWB(AM) (the "Gowdy Stations"), both licensed to Laramie, Wyoming and both assigned to the Cheyenne metro.

9. On September 28, 2000, the Commission issued public notices indicating that both of the subject applications had been accepted for filing.[11] The public notices also "flagged" the applications pursuant to the Commission's "50/70" screen. Under this screen, the Commission flags proposed transactions for further competition analysis if the transaction would result in one entity controlling 50% or more of the advertising revenues in the relevant Arbitron metro or two entities controlling 70% or more of the advertising revenues in that metro.[12] Based on current revenue estimates from the BIA database,[13]

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[7] *Id.* at 19894 ¶ 84.

[8] *Id.*

[9] *Id.* at 19895 ¶ 86.

[10] A "metro" is a metropolitan area defined by the Arbitron rating service and used by radio stations and radio advertisers in connection with measuring audience share and advertising revenue share.

[11] *See* Public Notice, Broadcast Applications, Report No. 24829 (rel. Sept. 28, 2000).

[12] *See generally Local Radio Ownership NPRM,* 16 FCC Rcd at 19870 ¶ 18 (rel. Nov. 9, 2001). A flagged public notice includes the following language:

> Note: Based on our initial analysis of this application and other publicly available information, including advertising revenue share data from the BIA database, the Commission intends to conduct additional analysis of the ownership concentration in the relevant market. This analysis is undertaken pursuant to the Commission's obligation under Section 310(d) of the Communications Act, 47 U.S.C. Section 310(d), to grant an application to

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the seven stations proposed to be commonly owned by Clear Channel account for a 60.2% advertising revenue share in the Cheyenne metro.

10. By letter dated November 15, 2001, pursuant to our interim policy, the staff requested that the parties provide additional information for the record in order to assess fully the transaction for its effect on the public interest ("Inquiry Letter"). The Inquiry Letter also afforded the parties an opportunity to update the record in light of the interim policy the Commission adopted regarding the processing of radio assignment and transfer of control applications.[14] Clear Channel filed a response on December 5, 2001.[15]

III. DISCUSSION

A. Framework for Analysis Under Interim Policy

11. Section 310(d) of the Communications Act of 1934, as amended (the "Communications Act"), requires the Commission to find that the public interest, convenience and necessity would be served by the assignment to Clear Channel of the above-captioned station licenses before the assignment may occur.[16] We are making that finding in this case pursuant to the interim policy laid out in the recently issued Local *Radio Ownership NPRM*.[17] Under the interim policy, we conduct a public interest analysis, including but not limited to an independent preliminary competition analysis of the proposed transaction based on publicly available information and information in the Commission's records.[18]

12. Under the interim policy, to decide whether a proposed assignment serves the public interest, we first determine whether it complies with the specific provisions of the Communications Act, other applicable statutes, and the Commission's rules, including our local radio ownership rules. If it does, we then consider any potential public interest harms of the proposed transaction as well as any potential public interest benefits to determine whether, on balance, the assignment serves the public interest.[19]

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> transfer or assign a broadcast license or permit only if so doing serves the public interest, convenience and necessity. We request that anyone interested in filing a response to this notice specifically address the issue of concentration and its effect on competition and diversity in the broadcast markets at issue and serve the response on the parties.

[13] BIA is a communications and information technology investment banking, consulting, and research firm. BIA provides strategic funding, consulting and financial services to the telecommunications, Internet, and media/entertainment industries.

[14] *See id.* Pursuant to the interim policy, the staff will review the facts and arguments contained in any pleadings that are filed in connection with a particular transaction, and will conduct a public interest analysis including, but not limited to, an independent preliminary competition analysis of the proposed transaction based on publicly available information and information in the Commission's records. In addition, the staff is authorized to request additional information from the parties to the extent required for the staff to issue or recommend a decision on the application.

[15] *See* Letter from Dorann Bunkin to Peter H. Doyle, Chief, Audio Services Division, Mass Media Bureau, FCC (Dec. 5, 2001) ("Clear Channel Response").

[16] *See* 47 U.S.C. § 310(d).

[17] *See Local Radio Ownership NPRM,* 16 FCC Rcd at 19894-97 ¶¶ 84-89.

[18] *Id*. at 19895-96 ¶ 86.

[19] *Id.* at 19895 ¶ 85; *see VoiceStream Wireless Corp.,* Memorandum Opinion and Order*,* 16 FCC Rcd 9779, 9789 ¶ 17 (2001); *see also Chet-5 Broadcasting, L.P.,* 14 FCC Rcd at 13043 ¶ 8 (holding that the Commission has "an independent obligation to consider whether a proposed pattern of radio station ownership that complies with the

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13. The Commission's analysis of public interest benefits and harms includes an analysis of the potential competitive effects of the transaction, as informed by traditional antitrust principles. While an antitrust analysis, such as that undertaken by the Department of Justice or the Federal Trade Commission, focuses solely on whether the effect of a proposed merger "may be substantially to lessen competition" in the advertising market,[20] our focus is different.[21] Our analysis of radio license assignments is informed by how those antitrust experts look at competition issues, yet our authority arises out of the Communications Act, which is not concerned solely with the potential impact of economic concentration on advertisers, but ultimately seeks to maximize the utility that the public derives from the public airwaves. The Commission's public interest evaluation is therefore not limited to competition concerns but necessarily encompasses the "broad aims of the Communications Act."[22] These broad aims include, among other things, ensuring the existence of an efficient, nationwide radio communications service, available to everyone and promoting locally oriented service and diversity in media voices.[23] Our public interest analysis therefore includes assessing whether the transfer will affect the quality of radio services or responsiveness to the local needs of the community,[24] and whether it will result in the provision of new or additional services to listeners.[25]

14. Thus, under our interim policy, where a proposed transaction raises concerns about economic concentration, we will consider evidence that the particular circumstances of a case may mitigate any adverse impact to radio listeners that might otherwise result, as well as any evidence of benefits to radio listeners that might result from the proposed transaction. Ultimately, it is the potential impact of the transaction on listeners that will determine whether we can find that, on balance, grant of a particular radio station assignment or transfer of control application serves the public interest.

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local radio ownership limits would otherwise have an adverse competitive effect in a particular local market and thus would be inconsistent with the public interest").

[20] 15 U.S.C. § 18.

[21] Although the Commission's analysis of competitive effects is informed by antitrust principles and judicial standards of evidence, it is not governed by them, which allows the Commission to arrive at a different assessment of likely competitive benefits or harms than antitrust agencies may find based solely on antitrust laws. *See FCC v. RCA Communications,* 346 U.S. 86, 96-97 (1953) ("To restrict the Commission's action to cases in which tangible evidence appropriate for judicial determination is available would disregard a major reason for the creation of administrative agencies, better equipped as they are for weighing intangibles by specialization, by insight gained through experience, and by more flexible procedure."). *See also RCA Communications,* 346 U.S. at 94; *United States v. FCC*, 653 F.2d 72, 81-82 (D.C. Cir. 1980) (*en banc*) (The Commission's "determination about the proper role of competitive forces in an industry must therefore be based, not exclusively on the letter of the antitrust laws, but also on the 'special considerations' of the particular industry."); *Teleprompter-Group W*, 87 FCC 2d 531 (1981), *aff'd on recon.,* 89 FCC 2d 417 (1982) (Commission independently reviewed the competitive effects of a proposed merger); *Equipment Distributors' Coalition, Inc. v. FCC,* 824 F.2d 937, 947-48 (1st Cir. 1993) (public interest standard does not require agency to "analyze proposed mergers under the same standards that the Department of Justice . . . must apply.").

[22] *See AT&T Corp.,* Memorandum Opinion and Order, 14 FCC Rcd 3160, 3168-69 ¶ 14 (1999); *WorldCom, Inc.,* Memorandum Opinion & Order, 13 FCC Rcd 18025, 18030-31 ¶ 9 (1998) ("*Worldcom-MCI Order"*).

[23] For example, the Supreme Court has repeatedly emphasized the Commission's duty and authority under the Communications Act to promote diversity and competition among media voices: it has long been a basic tenet of national communications policy that "the widest possible dissemination of information from diverse and antagonistic sources is essential to the welfare of the public." *Turner Broadcasting System, Inc. v. FCC*, 512 U.S. 622, 663 (1994) (*quoting United States v. Midwest Video Corp.*, 406 U.S. 649, 668 n.27 (1972)).

[24] *See Deregulation of Radio*, Report and Order, 84 FCC 2d 968, 994-97 (1981); *Sixth Report and Order*, Docket No. 8736, 1 RR 91:559, :624 (1952).

[25] *See, e.g., Worldcom-MCI Order*, 13 FCC Rcd at 18030-31 ¶ 9.

B. Local Radio Ownership Rules

15. The Commission's local radio ownership rules restrict the number of radio stations in the same service and the number of stations overall that may be commonly owned in any given local radio market.[26] A local radio market is defined by the area encompassed by the mutually overlapping principal community contours of the stations proposed to be commonly owned.[27] Under the rules, as amended by the Telecommunications Act of 1996, in a local radio market with 45 or more commercial radio stations, a single entity may own up to eight commercial radio stations, no more than five of which are in the same service; in a market with 30 to 44 commercial radio stations, one owner may hold up to seven commercial radio stations, no more than four of which are in the same service; in a market with 15 to 29 stations, a single owner may own up to six stations, no more than four of which are in the same service; and in a market with 14 or fewer stations, one owner may hold up to five stations, no more than three of which are in the same service, except that no single entity may control more than 50% of the stations in such a market.[28]

16. In *Definition of Radio Markets, Notice of Proposed Rulemaking*, 15 FCC Rcd 25077, 25082 ¶ 14 (2000) ("*Radio Market Definition NPRM"*), the Commission announced that it would defer consideration of applications which raise concerns about how it calculates the number of stations a party may own in a market; *i.e.,* applications that present the so-called "Pine Bluff" problem.[29] At issue in such cases is whether the "shifting market definition"[30] in our local radio station counting methodology is defensible and appropriate. Under this methodology it is possible to count a station as being "in the market" for purposes of determining the total number of in-market stations, but not "in the market" for purposes of determining the number of stations attributable to the proposed assignee.[31] We concluded that it would be inappropriate to apply this standard to pending and newly filed applications, reasoning that "the harm caused by application of this standard outweighs any harm caused by the deferment of decision on these applications."[32]

17. The instant transaction presents this "shifting market definition" scenario. Using the current methodology, this transaction creates three radio markets. There are a total of 47 stations in each of the three markets. Clear Channel currently owns fifteen of these 47 stations, and proposes to acquire two more. However, the existing methodology counts only seven stations as Clear Channel stations in each of these markets. In market 1, the seven stations would consist of three AM stations and four FM stations: KOWB(AM), KGAB(AM), KCOL(AM), (KCGY(FM), KIGN(FM),[33] KOLZ(FM), and KLEN(FM)(CP). In market 2, the seven stations would consist of two AM and five FM stations: KGAB(AM), KCOL(AM), KCGY(FM), KIGN(FM),[34] KOLZ(FM), KLEN(FM)(CP), and KMUS-FM. The same is

[26] 47 C.F.R. § 73.3555(a).

[27] *Id.*; *see Implementation of Sections 202(a) and 202(b)(1) of the Telecommunications Act of 1996*, 11 FCC Rcd 12368 (1996).

[28] *See* Telecommunications Act of 1996, Pub. L. No. 104-104, 110 Stat. 56 (1996), § 202(b)(1); 47 C.F.R. § 73.3555(a)(1).

[29] *See, e.g., Pine Bluff Radio, Inc.,* 14 FCC Rcd 6594 (1999).

[30] *See Radio Market Definition NPRM,* 15 FCC Rcd at 25082 ¶ 14.

[31] *See, e.g., 1998 Biennial Review Report,* FCC 00-191 (adopted May 26, 2000) ¶ 67.

[32] *Radio Market Definition NPRM*, 15 FCC Rcd at 25082 ¶ 14.

[33] An application for a construction permit to modify the station facilities was granted (*see* FCC File No. BPH-19981207IC), permitting a change in the signal contour. Such change has no impact on the discussion herein.

[34] *See id.*

true for market 3: KGAB(AM), KCOL(AM), KCGY(FM), KIGN(FM),[35] KOLZ(FM), KLEN(FM)(CP), and KGLL(FM). Thus, Clear Channel would be counting among the 47 stations "in" each of these markets the 10 stations that it owns but that are not counted against its ownership limits in those markets. And this inconsistency cannot be cured by removing the 10 stations from each market's total station count. If the 10 Clear Channel stations were so removed, there would only be 37 stations in each market and Clear Channel's combinations would violate the four same-service station limit in markets 2 and 3. Nor can the inconsistency be remedied by attributing the 10 stations to Clear Channel because this would result in a violation of the 8-station cap for the largest markets. Under the current counting methodology, however, the transaction complies with the local ownership limits set forth in 47 C.F.R. § 73.3555(a)(1)(i) for the largest markets: eight stations, not more than five of which can be in the same service.

18. Certain circumstances unique to this case persuade us to review the transaction using the current calculation methodology. The subject applications were filed almost three months prior to the release of the *Radio Market Definition NPRM* in which the deferral policy was announced. Thus, unlike parties to applications filed after the release of that NPRM, these parties reasonably expected that the Commission could and would determine promptly the applications' compliance with established local ownership caps. These two companion applications were, in fact, the only pending applications impacted by adoption of the deferral policy. Subsequent to our deferral of action on pending applications as announced in the *Radio Market Definition NPRM*, we adopted and released a Further Notice of Proposed Rulemaking in this proceeding.[36] Hence our establishment of ownership counting policies on a going forward basis is taking longer than we had originally anticipated. These factors lead us to conclude that it is appropriate to apply our current methodology, i.e., the "shifting market definition," in this one instance.

C. Public Interest Analysis Under Interim Policy

19. In the interim policy, we stated that, consistent with precedent, we will continue to examine the potential competitive effects of proposed radio station combinations. Competition analysis requires us to define at the outset the relevant product and geographic markets in which the radio stations compete. We must also determine the market shares and concentration levels that the proposed transaction would produce. Ultimately, we must weigh the potential competitive benefits and harms, as well as other public interest benefits and harms, that the proposed transaction is likely to produce to determine if, overall, grant of the underlying application would be consistent with the public interest.

20. Our competition review systematically examines each factor identified in the Commission's interim policy as well as additional information provided by applicants. In all cases, determining the relevant geographic market is a critical step in assessing the likely competitive effects of a radio transaction following completion of a merger. The Commission's interim policy for the competition review of proposed radio transactions presumes that the relevant geographic market is the relevant Arbitron metro, which in the instant case is the Cheyenne metro.

21. Clear Channel contests the Commission's presumption that the metro is the relevant geographic market for purposes of assessing the competitive effects of a radio transaction, both in general and as it relates to the instant transaction. Clear Channel explains that the Gowdy Stations that it proposes to acquire are licensed to the city of Laramie, which is located outside the geographic boundaries of the Cheyenne metro.[37] More specifically, the Cheyenne metro consists of only Laramie County, and all the Clear Channel Stations are licensed to cities located within Laramie County. By contrast, the Gowdy Stations are licensed to the city of Laramie located in Albany County, which is not

[35] *See id.*

[36] *See* note 1, *supra*.

[37] *See* Clear Channel Response at 3.

part of the Cheyenne metro. Clear Channel also explains that the cities of Laramie and Cheyenne are more than 40 miles apart and are separated by one of the tallest mountains in the area. As a result, both of the Gowdy Stations that Clear Channel proposes to acquire provide only degraded signals into the Cheyenne metro.[38]

22. Based on this geographic split, Clear Channel asserts that the Gowdy Stations and the extant Clear Channel Stations compete in two different "trading zones," such that the Gowdy Stations in Laramie do not compete with the Clear Channel Stations in Cheyenne, and vice versa.[39] Clear Channel also argues that both audience and revenue data demonstrate that the Gowdy Stations do not participate in any meaningful way in the Cheyenne metro. Specifically, Clear Channel notes that KOWB(AM) has not received any audience rating there since the fall of 1997, while KCGY(FM) received a rating of only 1.1 in the spring of 2001, its first rating in the Cheyenne metro since the fall of 1999.[40] Clear Channel further reports that these stations earn less than three-tenths of one percent of their revenue, or, in terms of dollars, less than $20,000 in revenue, from the Cheyenne metro,[41] while the Clear Channel Stations earn less than 1.0% of their revenues from Laramie advertisers.[42]

23. Our review of the record concerning the likely competitive effects of this transaction leads us to conclude that in this instance the relevant geographic market for analysis of the proposed transaction is not the Cheyenne metro, where the Clear Channel Stations compete. Clear Channel has sufficiently demonstrated that Laramie and Cheyenne are each a separate geographic market. More specifically, we conclude that the Gowdy Stations in Laramie do not today, and will not following their proposed common ownership with the Clear Channel Stations, provide radio advertisers in the Cheyenne metro with a reasonable substitute for radio advertising even if the Clear Channel Stations could exercise market power in the Cheyenne metro. Furthermore, as Clear Channel currently owns no stations licensed to Laramie, acquisition of the Gowdy Stations can be treated as the acquisition of an existing combination in Laramie, warranting no further competition review under current Commission policy. Consequently, the proposed merger is likely to have little or no effect on radio competition in the Cheyenne metro, and having determined that the parties are otherwise qualified, we find that granting the above-captioned applications would serve the public interest, convenience and necessity.

IV. ORDERING CLAUSES

24. ACCORDINGLY, IT IS ORDERED, That the application to assign station KCGY(FM), Laramie, WY from Gowdy FM 95, Inc. to Clear Channel Broadcasting Licenses, Inc. (File No. BALH-20000915ABK) IS GRANTED.

25. IT IS FURTHER ORDERED, That the application to assign station KOWB(AM), Laramie, WY from Gowdy Family LP to Clear Channel Broadcasting Licenses, Inc. (File No. BAL-20000915ABQ) IS GRANTED.

FEDERAL COMMUNICATIONS COMMISSION

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[38] *See id.* at 3-4.

[39] *See id.*

[40] *See id.* at 4.

[41] Analysis by MMB staff economists indicates that $20,000 is approximately 11% of the Gowdy Stations' estimated annual revenue ($175,000). Revenue of $20,000 is approximately 0.37% percent of the total advertising revenue attributed to the Cheyenne metro ($5.4 million).

[42] *See* Clear Channel Response at 5.

William F. Caton
Acting Secretary

SEPARATE STATEMENT OF CHAIRMAN MICHAEL K. POWELL

Re: *Application of Gowdy FM 95, Inc. and Clear Channel Broadcasting Licenses, Inc. For Consent to the Assignment of the License of KCGY(FM), Laramie, WY, and Application of Gowdy Family LP and Clear Channel Broadcasting Licenses, Inc. For Consent to the Assignment of the License of KOWB(AM), Laramie, WY;*

Applications of Golden Triangle Radio, Inc. and Cumulus Licensing Corp. For Consent to the Assignment of the Licenses of WKOR(FM), Columbus, MS, WMXU(FM) and WSSO(AM) Starkville, MS, and Application of Charisma Broadcasting Co. and Cumulus Licensing Corp. For Consent to the Assignment of the License of WKOR(AM) Starkville, MS, and Application of Bravo Communications, Inc. and Cumulus Licensing Corp. For Consent to the Assignment of the License of WSMS(FM), Artesia, MS, and Applications of Radio Columbus, Inc. and Cumulus Licensing Corp. For Consent to the Assignment of the Licenses of WJWF(AM) and WMBC(FM), Columbus, MS;

Applications of Great Scott Broadcasting and Nassau Broadcasting II, L.L.C. For Consent to the Assignment of the Licenses of WCHR(AM), Trenton, NJ and WNJO(FM), Trenton, NJ;

Applications of Cumulus Licensing Corp. and Clear Channel Broadcasting Licenses, Inc. For Consent to the Assignment of the Licenses of WMLF(AM), Columbus, GA, WVRK(FM), Columbus, GA, WGSY(FM), Phenix City AL, WPNX(AM), Phenix City AL, WAGH(FM), Ft. Mitchell, AL, and WBFA(FM), Smiths, AL; and

Application of Air Virginia and Clear Channel Radio Licenses, Inc. For Consent to the Assignment of the License of WUMX(FM), Charlottesville, VA.

Today, we act on five of the oldest and most difficult radio assignment cases pending before us. Guided by the Communications Act, Commission precedent, and the Interim Policy we adopted in the Local Radio Ownership NPRM, we find in four of these cases that the license assignments are consistent with the public interest, and therefore we grant the applications. Relying on this guidance in our review of the license assignment in Charlottesville, Virginia, however, we cannot find based on the record before us that the license assignment is consistent with the public interest. Therefore, as required by the Communications Act, we designate that application for hearing.

Each of the five cases we decide today present difficult policy issues that arise from the increasing levels of concentration that have occurred in the radio market since 1996, when Congress significantly relaxed the limits on ownership of radio stations in a local market. A genuine concern about increased levels of concentration led the Commission to start "flagging" certain cases. Despite the Commission's attempts, this ad hoc process too often led to inconsistent decision-making and delays in processing applications. To remedy this problem, and "to undertake a comprehensive examination of our rules and policies concerning local radio ownership," we adopted the *Local Radio Ownership NPRM.* [43] This proceeding will address difficult questions which to date have remained unresolved.

We recognized, however, that a final decision in the Local Radio Ownership proceeding would take time, and that too many radio assignment cases have been pending for too long. Accordingly, we established an Interim Policy , to provide greater transparency to the review process and to "guide our actions on radio assignment and transfer of control applications pending a decision in this proceeding."[44] Under this policy, in addition to examining whether the proposed assignment complies with the Communications Act and the Commission's rules, we conduct a competitive analysis of the proposed transaction and examine the potential impact of concentration in advertising markets. Our public interest analysis does not stop there, however. Unlike antitrust agencies, which focus solely on whether the effect of a proposed merger "may be substantially to lessen competition,"[45] the Commission must examine other factors. Indeed, the Communications Act compels us to consider the broad aims of "ensuring the existence of an efficient, nationwide radio communications service"[46] and promoting locally oriented service and diversity in media voices.

In short, the Communications Act does not permit the Commission to turn a deaf ear to radio listeners. Thus, while our competitive analysis is informed by antitrust principles, our ultimate obligation is to consider the potential benefits and harms of the transaction on the listening public. Where we find evidence that a proposed transaction will benefit listeners, we must weigh that factor against the potential harm to advertisers in determining whether the transaction is consistent with the public interest. We must also examine whether particular or unique circumstances of a market might mitigate the potential harm from such high levels of concentration. But where we cannot find an overall benefit to listeners or mitigating factors, we have no basis on which to conclude that the transaction will serve the public interest. In those cases, we must designate the application for hearing.

As stated, in four of the cases before us, the Commission found that, on balance and for different reasons, grant of the applications served the public interest. In Trenton, for example, we found that the "in market" stations capture only 36.7% of the Trenton audience, while the remaining 63.3% listen to "out of market stations." Moreover, thirty "out of market stations" have enough Trenton listeners to meet BIA reporting data. We also found that, through its operation of WNJO (under an LMA agreement), the applicant has considerably improved the station's performance through improved local news, weather and information.

In Cheyenne the record showed that the relevant geographic market is not the Cheyenne Arbitron metro because among other things, one of the tallest mountains in the area significantly limits the reach of the radio station signals of the assignor and assignee into each other's service areas. Thus, we concluded that the stations do not today, nor will they in the future, compete for advertising. In Columbus, Georgia, we found that significant format and radio advertising

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[43] *See, Rules and Policies Concerning Multiple Ownership of Radio Broadcast Stations in Local Markets*, 16 FCC Rcd 19861 (2001).

[44] *Id.* at 19894 (¶ 84).

[45] 15 U.S.C. § 18.

[46] 47 U.S.C. § 151.

competition from three large radio station groups, one new entrant, and one out-of market radio station would continue to exist after the transaction. Finally, in Columbus-Starkville, Mississippi, we found that the potential for competitive harm was outweighed by the significant public interest benefits to listeners, including greater access to locally generated radio programming.

In Charlottesville, however, no public interest benefits or mitigating circumstances were presented that would outweigh the high level of concentration that the proposed transaction would produce. Indeed, on the record before us, the only significant evidence presented was that the transaction would create a market in which the top two owners would have a combined 94.2% market share. This level of concentration, in the absence of any countervailing considerations or public interest benefits, is simply too significant for us to conclude that, on balance, the transaction is consistent with the public interest. Accordingly, in this case, we designate, as we must, the assignment application for hearing to determine whether grant would serve the public interest, convenience and necessity.

SEPARATE STATEMENT OF COMMISSIONER KATHLEEN ABERNATHY

Re: *Application of Gowdy FM 95, Inc and Clear Channel Broadcasting Licenses, Inc. For Consent to the Assignment of the License of KCGY(FM), Laramie, WY, and Application of Gowdy Family LP and Clear Channel Broadcasting Licenses, Inc. For Consent to the Assignment of the License of KOWB(AM), Laramie, WY;*

Applications of Golden Triangle Radio, Inc. and Cumulus Licensing Corp. For Consent to the Assignment of the Licenses of WKOR(FM), Columbus, MS, WMXU(FM) and WSSO(AM) Starkville, MS, and Application of Charisma Broadcasting Co. and Cumulus Licensing Corp. For Consent to the Assignment of the License of WKOR(AM) Starkville, MS, and Application of Bravo Communications, Inc. and Cumulus Licensing Corp. For Consent to the Assignment of the License of WSMS(FM), Artesia, MS, and Applications of Radio Columbus, Inc. and Cumulus Licensing Corp. For Consent to the Assignment of the Licenses of WJWF(AM) and WMBC(FM), Columbus, MS;

Applications of Great Scott Broadcasting and Nassau Broadcasting II, L.L.C. For Consent to the Assignment of the Licenses of WCHR(AM), Trenton, NJ and WNJO(FM), Trenton, NJ;

Applications of Cumulus Licensing Corp. and Clear Channel Broadcasting Licenses, Inc. For Consent to the Assignment of the Licenses of WMLF(AM), Columbus, GA, WVRK(FM), Columbus, GA, WGSY(FM), Phenix City AL, WPNX(AM), Phenix City AL, WAGH(FM), Ft. Mitchell, AL, and WBFA(FM), Smiths, AL; and

Application of Air Virginia and Clear Channel Radio Licenses, Inc. For Consent to the Assignment of the License of WUMX(FM), Charlottesville, VA.

I support today’s decisions granting four of the five oldest pending radio merger applications and setting one for hearing. I recognize that these cases have raised particularly difficult issues, but that is not a reason for failing to resolve them in a timely manner. I am pleased that, by today’s decisions, we are finally able to provide answers to the applicants – some of whom have been waiting for years. Regardless of the outcome, the Commission owes it to consumers and the industry to provide prompt and clear answers to regulatory questions. I look forward to working with my colleagues to resolve the other pending radio applications and the outstanding Notice of Proposed Rulemaking.

STATEMENT OF COMMISSIONER MICHAEL J. COPPS ON RADIO TRANSFER APPLICATIONS

In the Matter of Golden Triangle Radio, Inc., Charisma Broadcasting Co., Bravo Communications, Inc., Radio Columbus and Cumulus Licensing Corp. (Columbus, MS)

In the Matter of Solar Broadcasting Company, Cumulus Licensing Corp. and Clear Channel Broadcasting Licenses Inc. (Columbus, GA)

In the Matter of Great Scott Broadcasting and Nassau Broadcasting (Trenton, NJ)

In the Matter of Air Virgina, Inc. and Clear Channel Radio Licenses, Inc. (Charlottesville, VA)

In the Matter of Gowdy FM 95 and Gowdy Family LP and Clear Channel Broadcasting Licenses, Inc. (Laramie, WY)

I have struggled to find the public interest in the grant of these transfers. Given the levels of market concentration – both of advertising and audience share – that will result from these transactions, I can support the grant of only one of the five transfers at issue here. That one transaction arises in a unique geographic circumstance, in which the potential harm to competition was not significant and was outweighed by the benefits of the transaction. In the other four cases, however, I find evidence of significant anticompetitive effects. I could not support grant of these transfers absent additional information on the public interest benefits. I support the decision of the Commission to send one of these five transfers to hearing, and would have sent another three to hearing as well.

I am troubled by the trend toward greater and greater consolidation of the media as exemplified by these transactions. I am further troubled by the Commission's acceptance of these levels of concentration in radio, particularly in the smaller radio markets at issue here. The five transactions before us here would each result in levels of concentration that are greater than that approved by the Commission in the past, and are potentially harmful to competition. Given the small markets at issue here, the effects of extreme concentration are that much more pernicious.

Each transaction presents slightly different issues regarding the acceptable levels of concentration in a market, the definition of a local radio market, or the attribution of local marketing agreements for the purposes of competitive analysis. The one transaction I am able to support, albeit hesitantly, involves the transfer of the Gowdy stations in Laramie, Wyoming to Clear Channel Broadcasting, Inc. While I am tremendously concerned about the unprecedented levels of market domination Clear Channel has achieved in radio markets throughout the country – including in Cheyenne, Wyoming – the transaction before the Commission does not appear to increase Clear Channel's dominance in this market. Due to the unique topography of the area, the Laramie stations deliver marginal signals into Cheyenne. This geographic anomaly permits the substitution of separate geographic markets for Cheyenne and Laramie, in lieu of the presumptive Arbitron market definition, thus I support the transfer of these licenses from the Gowdy licensees to Clear Channel.

Speaking generally, however, these transactions, taken together with the dozens of transactions approved by the Bureau last year, result in the Commission's adoption of an unacceptable standard for concentration in local radio markets. The amount of concentration in the markets at issue here is potentially very harmful to competition, to the listening public and to America's deeply held values of localism and diversity.

As I have often stated, Congress directed us to look to the public interest as we review transactions. Congress told the Commission that it may grant a broadcast license transfer only if "the public interest, convenience and necessity will be served thereby."[47] Competition is, and always has been, an essential part of the public interest, and I believe that a competitive analysis is an important part of the public interest in a particular transaction.[48]

I don't think that my faith in competition is particularly radical. In fact, it is a cardinal principle underlying the 1996 Act. In these relatively small radio markets, the anticompetitive effects of such high levels of concentration are likely to be especially pronounced. When one or two owners wield this much power in a particular market, they can make it impossible for independent stations to survive or even compete.

When it comes to transfers of broadcast licenses, our analysis must go beyond competitive analysis, to the effects of the transfer on factors unique to broadcasting – localism and diversity. This is consistent with Commission precedent, in which we have found that we have "an independent obligation to consider whether…radio ownership that complies with the local ownership limits would otherwise have an adverse competitive effect in a particular radio market and thus, would be inconsistent with the public interest." [49]

Neither is this a radical position. As a market-based democratic society, we value independent voices in the media. For a robust marketplace of ideas to survive, *each community* must have a diversity of sources of information available to its members – not just a *variety* of formats, but *diversity* of formats and of ownership. As consolidation of market power makes it

[47] 47 U.S.C. § 310(d).

[48] *See, e.g., FCC v RCA Communications, Inc.,* 346 U.S. 86, 94 (1953)("There can be no doubt that competition is a relevant factor in weighing the public interest."). ; *Mansfield Journal Co. v. FCC,* 180 F.2d 28, 33 (D.C. Cir. 1950)("Monopoly in the mass communications of news and advertising is contrary to the public interest, even if not in terms proscribed by the antitrust laws."); *Rogers Radio Communications Services, Inc. v. FCC,* 593 F.2d 1225, 1230 (D.C. Cir. 1978)(The "effect on competition [is] clearly a proper factor for the Commission to consider under the public interest, convenience and necessity standard. . . .").

[49] *CHET-/5 Broadcasting L.P.,* 14 FCC Rcd 13041, 13043 (1999).

harder and harder for independent stations to compete, local markets lose the diversity so essential to the free exchange of ideas in their community.

No single factor necessarily defines whether a particular transaction is in the public interest. Nevertheless, when harm to competition is likely to result from the grant of an application, it behooves the Commission to assure itself with as much certainty as is possible, that despite the harm to competition, each transaction will nonetheless serve the public interest, convenience and necessity. In order to make this determination where such high concentration levels will result, without clear evidence of strong public interest benefits, as in four of the cases before us today and discussed below, I am convinced that we must further examine the issues at a hearing.

SEPARATE STATEMENT
OF COMMISSIONER KEVIN J. MARTIN

Re: *Application of Gowdy FM 95, Inc and Clear Channel Broadcasting Licenses, Inc. For Consent to the Assignment of the License of KCGY(FM), Laramie, WY, and Application of Gowdy Family LP and Clear Channel Broadcasting Licenses, Inc. For Consent to the Assignment of the License of KOWB(AM), Laramie, WY;*

Applications of Golden Triangle Radio, Inc. and Cumulus Licensing Corp. For Consent to the Assignment of the Licenses of WKOR(FM), Columbus, MS, WMXU(FM) and WSSO(AM) Starkville, MS, and Application of Charisma Broadcasting Co. and Cumulus Licensing Corp. For Consent to the Assignment of the License of WKOR(AM) Starkville, MS, and Application of Bravo Communications, Inc. and Cumulus Licensing Corp. For Consent to the Assignment of the License of WSMS(FM), Artesia, MS, and Applications of Radio Columbus, Inc. and Cumulus Licensing Corp. For Consent to the Assignment of the Licenses of WJWF(AM) and WMBC(FM), Columbus, MS;

Applications of Great Scott Broadcasting and Nassau Broadcasting II, L.L.C. For Consent to the Assignment of the Licenses of WCHR(AM), Trenton, NJ and WNJO(FM), Trenton, NJ;

Applications of Cumulus Licensing Corp. and Clear Channel Broadcasting Licenses, Inc. For Consent to the Assignment of the Licenses of WMLF(AM), Columbus, GA, WVRK(FM), Columbus, GA, WGSY(FM), Phenix City AL, WPNX(AM), Phenix City AL, WAGH(FM), Ft. Mitchell, AL, and WBFA(FM), Smiths, AL; and

Application of Air Virginia and Clear Channel Radio Licenses, Inc. For Consent to the Assignment of the License of WUMX(FM), Charlottesville, VA.

I – as well as everyone at the Commission – am concerned about the increasing levels of concentration of radio station ownership that has taken place during the last five years.

Last November, the Commission issued a NPRM undertaking a comprehensive review of how the Commission should assess radio license transfer applications. At that time, I expressed my dismay at the length of time many of these applications had been pending at the Commission. I am heartened that today, we are ruling on the five oldest applications (all pending for over 16 months).

All of the pending transfer applications comply with the structural ownership limits created by Congress in §202(b) of the 1996 Telecommunications Act. I continue to believe such structural limits should make our review of proposed mergers easier, not more complicated. I thus expressed my reluctance last November in agreeing to an interim policy that continued – and expanded upon – the practice of flagging particular transfers for a more detailed analysis, when they would be below the statutory ownership limit. Nevertheless, I voted for the NPRM because it fairly raised the issue of what our policy should be with respect to assessing radio transfers, and it included timing deadlines that would ensure timely action on the pending applications. Today's actions on the oldest applications are a direct result of those deadlines. I am extremely pleased that we finally are providing the parties with resolution.

Each of the applications listed above was subjected to a comprehensive competitive analysis as set forth in the interim guidelines. I agree with the majority of my colleagues that the factors weigh against granting Clear Channel's acquisition of Air Virginia's radio license in Charlottesville, VA. Based on the record before us, I am unable to conclude that this transfer would serve the public interest. I therefore vote to set this application for hearing.